

SEP 8 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

JERSON RAMOS CALUYA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

No. 02-70215

INS No. A70-210-869

AMENDED
MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted February 5, 2003**
Pasadena, California

Filed April 3, 2003
Amended September 8, 2003

Before: D.W. NELSON, WARDLAW and FISHER, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Jerson Ramos Caluya petitions for review of the Board of Immigration Appeals's decision upholding the denial of his untimely motion to reopen his case. The BIA determined that, prior to being ordered deported *in absentia*, Caluya received notice of the deportation hearing, and that he was not entitled to equitable tolling of the motion to reopen deadline. We have jurisdiction pursuant to 8 U.S.C. § 1105a (repealed 1996) to review the BIA's order, and we deny the petition.

We lack jurisdiction to review Caluya's assertion that the IJ and BIA erred under *In re M-S-*, 22 I. & N. Dec. 349 (B.I.A. 1998) (en banc), in applying the wrong standard in evaluating his motion, because he raises this argument for the first time before us. *See Cortez-Acosta v. INS*, 234 F.3d 476, 480 (9th Cir. 2000). We simply note that Caluya's motion was untimely by either standard, as it was filed nearly seven years after the *in absentia* deportation order was entered. 8 C.F.R. § 3.23(b)(4)(iii)(A)(1) (motions to rescind must be filed within "180 days [from] the date of the [*in absentia* deportation] order" if the alien wishes to demonstrate that his "failure to appear was because of exceptional circumstances"); *id.* § 3.23(b)(1) (motions to reopen "must be filed within 90 days of the date of entry of a final administrative order of . . . deportation"). Caluya has

failed to allege fraud or misconduct sufficient to entitle him to equitable tolling of either of these filing deadlines. *Fajardo v. INS*, 300 F.3d 1018, 1020-21 (9th Cir. 2002).

Caluya's assertion that his motion was nevertheless timely under 8 C.F.R. § 3.23(b)(4)(iii)(A)(2) because he never received actual notice of his deportation hearing, even though the Immigration Court sent him notice by certified mail, is waived because he raised it for the first time in his supplemental brief. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996).

DENIED.